Supreme Court, U.S.
FILED

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No. 02-

IN THE

Supreme Court of the United States

HARRY PTASYNSKI, BRIDWELL OIL COMPANY, GERALD O. BAILEY, and W.L.GRAY & CO.,

Petitioners,

v.

RUTTER & WILBANKS CORP., CO2 CLAIMS COALITION, LLC, and SHELL OIL COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Tenth Circuit Court of Appeals err in denying intervention due to the inadequate representation of the class representative and conflicts of interest of the coalition and class counsel?

II. Did the Tenth Circuit Court of Appeals deny Petitioners due process by denying them the opportunity to intervene in the actions involving their interests because Petitioners objected to the aggregate settlement of the cases?

LIST OF PARTIES

Petitioners:

Harry Ptasynski

Bridwell Oil Company, a Texas Partnership

Gerald O. Bailey

W.L.Gray & Co., a Colorado Partnership

Respondents - Plaintiff (The CO2 Claims Coalition Case):

CO2 Claims Coalition, LLC

Respondents - Defendants:

Shell Oil Company

Shell CO2 Company, Ltd., a/k/a Kinder Morgan CO2 Company, L.P.

Shell Western E&P, Inc.

Mobil Producing Texas and New Mexico, Inc.

Cortez Pipeline Company

Respondents - Plaintiffs (The Rutter & Wilbanks Case):

Rutter & Wilbanks Corp.

Elliott A. Riggs

William R. Thurston, Trustee

Gordon Tanner

Walter K. Arbuckle Trust

Eric B. Wells

Kevin C. Wells

Charles R. Wiggins

Ken Kamon

Respondents - Defendants:

Shell Oil Company

Shell Western E&P, Inc.

Mobil Oil Corporation

Mobil Producing Texas and New Mexico, Inc.

Mobil Exploration & Producing, U.S., Inc.

Exxon Mobil, Inc.

Cortez Pipeline Company

Shell CO2 Company, Ltd.

Kinder Morgan CO2 Company

STATEMENT PURSUANT TO RULE 29.6

None of the Petitioners are in corporate form.

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OPINIONS BELOW

The Order and Judgments of the United States Court of Appeals for the Tenth Circuit dated January 2, 2003 are set forth in Appendices A and B, p. 1a and 9a. The Order of the United States District Court in the class action which denied the interventions of Gerald Bailey and W.L.Gray & Co. dated January 17, 2002 is set forth in Appendix E, p. 38a. The April 19, 2002 Orders of the United States District Court in the Coalition case and the class action which explained the November 13, 2001 Minute Orders which denied the motions to intervene filed by Harry Ptasynski and Bridwell Oil Company are set forth in Appendices C and D, p. 14a and 26a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1254(1). The United States Court of Appeals for the Tenth Circuit affirmed the denial of the interventions on January 2, 2003.

CONSTITUTIONAL PROVISION AND RULES INVOLVED

Constitutional Issue

1. Fifth Amendment of the United States Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in

the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rules

Rule 23(d)(2), Federal Rules of Civil Procedure

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses or otherwise to come into the action;

Rule 24(a), Federal Rules of Civil Procedure

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject

of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

On October 22, 1996, the CO2 Claims Coalition (the "Coalition") filed a class action complaint against major producers of carbon dioxide from the McElmo Dome (Leadville) Unit. The McElmo Dome carbon dioxide unit was unitized on April 1, 1983 after consents had been obtained in compliance with the Colorado statute for unitization. All four Petitioners are overriding royalty interest owners in the McElmo Dome Unit. Their interests include overrides in federal, state and fee leases for the production of oil, gas and carbon dioxide. Bridwell Oil Company ("Bridwell") entered into a relationship with the Coalition and the lawyers Mr. Cogswell, Mr. Crowley and Mr. Hjelmfelt in April 1996 whereby the Coalition and its attorneys would present Bridwell's claims for the unlawful pricing for carbon dioxide produced from the McElmo Dome against the working interest owner producers, primarily Shell, Mobil and Kinder Morgan. Bridwell contributed over $164,000 to the Coalition and its counsel to advance its unlawful pricing claims. Harry Ptasynski ("Ptasynski") joined the Coalition on April 1, 1997 as a member and assigned his claims for the unlawful pricing of carbon dioxide produced from the McElmo Dome Unit to the Coalition. Ptasynski contributed over $37,400 to the Coalition and the attorneys were to represent the pricing claims of the Coalition members in the suit. The Coalition became a limited liability company as of July 1, 1996 for a five year term in order to pursue the

litigation. The majority of interests in the Coalition are held by working interest owners and mineral interest owners who are treated as working interest owners. Gerald Bailey ("Bailey") and W.L.Gray & Co. ("Gray"), were not members of the coalition or involved in the Coalition lawsuit.

The major claims of the Coalition lawsuit involved the unlawful pricing of the carbon dioxide produced from McElmo Dome and antitrust implications of the pricing. Since pricing was controlled by the major working interest producers, the conflicts of interests between the members of the Coalition who were working interests and the members of the coalition who were royalty interests were minimized. On February 26, 1999, the Court denied the Coalition's class certification motion. The Coalition filed a second Motion for Class Certification which was denied on March 22, 2000 because the Court determined that the alleged class members' interests were too divergent to warrant class certification. Previous to the second denial of class certification one of the coalition lawyers, Mr. Crowley, acquired a working interest in the McElmo Dome through the use of a partnership in which he was a general partner, El Dorado Investments. This occurred around November 14, 1999.

After the second denial of class certification, the Coalition lawyers began a process by which they would secure additional clients on whose behalf they would file cases in the Denver district court and obligate the Coalition to pay for the majority of the legal expenses involved. Coalition lawyer Crowley prepared an Agency Agreement which allowed the Coalition to "manage" the cases. Under the Agency Agreement each party that agreed to be represented by the Coalition and its lawyers executed the Agency Agreement which gave control of the litigation claims to the Coalition.

On September 22, 2000, three additional class action complaints, similar to the Coalition complaint, were filed in the Denver district court by the Coalition attorneys. One class action was filed on behalf of the class of working interest owners, another on behalf of royalty interest owners, and a third on behalf of overriding royalty interest owners. Although each class action had a number of named Plaintiffs; only one party in each of the cases served as a class representative. In the overriding royalty interest owner case, the sole class representative was Rutter & Wilbanks Corp. Rutter & Wilbanks' overriding royalty interest in the McElmo Dome is quite small and is a small fraction of the interest of any of the Petitioners. In addition, Rutter & Wilbanks contracted away authority to manage its claims in exchange for the Coalition paying for the majority of its litigation costs.

In July of 2001, the Colorado Supreme Court issued its landmark decision concerning the question of marketability and the obligation of working interest owners. In *Rogers v. Westerman Farm Co.*, 29 P.3d 887 (Colo. 2001) the Colorado Supreme Court defined marketability, as required under the implied covenant to market, to mean that gas was marketable when it was in the physical condition such that it is acceptable to be bought and sold in the commercial market place, and in the location of the commercial marketplace, such that it is commercially saleable in the oil and gas marketplace. The Colorado Supreme Court explained that its decision was in further explanation of its prior holdings in *Garman v. Conoco, Inc.*, 886 P.2d 652 (Colo. 1994) and *Davis v. Cramer*, 808 P.2d 358 (Colo. 1991) which were based upon the implied duty to market imposed on working interests in Colorado oil and gas leases. The court held it made no difference whether short distance or long distance transportation costs were

involved; it was the lessee's obligation to transport to the commercial marketplace. This is the "no transportation" claim. It is a very valuable claim for all overriding royalty and royalty interest owners in the McElmo Dome. The decision is of the utmost importance regarding production from the McElmo Dome because there is no market for carbon dioxide in Colorado. The carbon dioxide produced from the McElmo Dome field must be transported 500 miles through the pipeline owned by the working interest producers to oil fields in West Texas for enhanced oil recovery, the commercial marketplace.

Over the last 20 years Shell, Mobil and Kinder Morgan have secretly deducted transportation charges to West Texas from the private royalty and overriding royalty interests in McElmo Dome. The lawyers for the Coalition have never made the "no transportation" claim because they represent working interests owners who are required to pay for the transportation. This puts the Coalition and its lawyers in direct conflict with their "purported" representation of overriding royalty interests and royalty interests of Coalition members and members of the classes for overriding royalty interests and royalty interests. Overriding royalty interests and royalty interests are to be free of the transportation charges to the commercial marketplace. In this regard the working interests represented by the Coalition lawyers stand in the same shoes as the major producers, Shell, Mobil and Kinder Morgan. Shell, Mobil and Kinder Morgan are the defendants in the Coalition case and the three class action lawsuits and will substantially benefit from the aggregate settlement.

The conflict of interest between working interest owners and royalty interest owners is a structural conflict which

cannot be ignored. Working interests must pay transportation costs to the commercial marketplace. The interests of the overriding royalty interests and royalty interests are required to be free of such costs. The conflict of interest is basic; one side is required to pay the costs and the other side is to be free of the costs. The conflicts of interest were magnified in that the Coalition, controlled by working interests, controlled the management and settlement of the class actions filed for the overriding royalty interests and royalty interests. This was accomplished by the Agency Agreement created by Mr. Crowley, the Coalition lawyer who was himself a working interest owner in the McElmo Dome field. The Coalition lawyers controlled the Coalition case and also controlled the class actions. Mr. Crowley was a named Coalition lawyer and was named as a lawyer representing Plaintiffs in all three class actions. In addition, Mr. Crowley was a named party in the working interest class action through his El Dorado Investments partnership. Rather than resolve these conflicts the lawyers breached the fiduciary duty of undivided loyalty they owed to Bridwell and Ptasynski as clients. By their control over the Coalition they were able to have the Coalition abandon Bridwell and Ptasynski as Coalition members.

In the summer of 2001, the Coalition and its lawyers decided that they would not pursue the interests of Bridwell and Ptasynski as members of the Coalition in the Coalition case. Bridwell and Ptasynski have never withdrawn, retired or resigned their membership in the Coalition. They have never opted out of the Coalition lawsuit. Bridwell and Ptasynski believed the Coalition expired on July 1, 2001 by the terms of the agreements. On August 6, 2001, Mr. Ptasynski filed his Motions to Intervene in the Coalition lawsuit and the overriding royalty interest owner class action

(Rutter & Wilbanks case). His primary grounds were that the representation of his interests by the Coalition and by Rutter & Wilbanks was inadequate and due to the conflicts of interest by the Coalition lawyers, his interests could not be represented by the lawyers. Bridwell filed its Motions to Intervene in the Coalition case and the overriding royalty interest owner case on August 9, 2001. At the time Ptasynski and Bridwell applied for intervention, no settlement had been reached in the cases. The Coalition and its lawyers fought the interventions and took the position that Bridwell and Ptasynski were no longer members of the Coalition. The Coalition kept the $200,000 paid by Bridwell and Ptasynski as members and kept Ptasynski's pricing claims which previously had been assigned to the Coalition.

On September 24, 2001, the Coalition with the three class representatives, and the lawyers executed a written settlement agreement with the defendants in the four lawsuits. No waiver of conflicts of interest was ever requested or received by the Coalition lawyers. The settlement was an aggregate settlement which treated the claims of the cost bearing working interests in the same manner as the "cost free" royalty interests. The aggregate settlement also required the release of all claims that might have been raised in any of the suits, including the "no transportation" claim that had never been raised in any of the actions. As expected, the lion's share of all relief provided by the settlement went to the Coalition and the Coalition lawyers.

The Bridwell and Ptasynski Motions to Intervene were denied by Minute Order on November 13, 2001. Appeals were taken and briefing for the appeals completed before the District Court issued its Orders filed April 19, 2002 (Appendices, C and D).

On December 6, 2001, the Court preliminarily approved certification of the three class actions and the settlement and ordered notices sent to potential class members. The notices directed recipients who did not wish to be represented by class counsel to enter appearances and file objections by January 22, 2002. Bailey and Gray received the notices as class members in the overriding royalty owner class action, entered appearances, and filed a Motion to Intervene as Plaintiffs under Rules 23 and 24 on January 10, 2002. Their appearances were entered well within the deadline provided in the Notices. On January 17, 2002, the Court denied the Motion to Intervene (Appendix E, page 38a) primarily because the late date in which the applicants moved for intervention even though a supplemental notice had extended the deadline to file appearances to January 25, 2002. Bailey and Gray appealed and the Tenth Circuit Court of Appeals affirmed the denial primarily based upon standing because Bailey and Gray had opted out of the aggregate settlement. On January 2, 2003, the Tenth Circuit Court of Appeals issued its Orders and Judgments which affirmed the denial of the intervention requests of Petitioners.

REASONS FOR GRANTING THE WRIT

I. Certiorari Is Warranted Because The Decision Below Compels Acceptance By Unnamed Class Members Of An "Aggregate Settlement" Of Competing Interests Where The Class Representative Is Inadequate And Counsel Is Infected With Conflicts Of Interests.

The case before the court presents a vivid picture of the impact that conflicts of interest have when attorneys make an aggregate settlement of competing class actions and the class representative fails to adequately represent the unnamed class members. In this case the overriding royalty owner class representative had abdicated his authority and responsibility to persons controlled by working interests that were adverse to the interests of the overriding royalty owner class members. This case involves both the lack of adequate representation in the class action context and also in the case where counsel represents multiple parties and decides to abandon one of the parties when counsel's interests conflict with the client's interests.

Petitioners Bridwell and Ptasynski are overriding royalty owners in the McElmo Dome Unit who became members of the CO2 Coalition to pursue unlawful pricing of carbon dioxide produced from the McElmo Dome by the major working interest owners, Shell Oil Company, Mobil Oil Corporation and others. The Coalition lawsuit was filed October 22, 1996 as a class action but class certification was denied twice. Bridwell joined the Coalition in April of 1996 before any lawsuit was filed and Ptasynski joined the Coalition in April of 1997 just after the lawsuit was filed. Collectively they contributed over $200,000 to pursue their litigation claims in the Coalition case.

Unknown to Bridwell and Ptasynski, in the summer of 2000, the lawyers of the Coalition solicited clients to participate in competing class actions after the district court denied their second Motion for Class Certification of the Coalition case. The new class actions involved a working interest class action, a royalty owner class action and an overriding royalty owner class action. The lawyers were able to do this through the promise that the Coalition would bear the major expenses for the class actions and in return the Coalition would be the class action litigation agent with authority to manage and settle the cases. The conflicts of interests and the questions regarding adequacy of class representatives and counsel existed the moment the lawsuits were filed in September 2000; however, Coalition members were not informed of the new class actions. The conflicts of interest in the cases are structural because the interest of a working interest is entirely different and adverse to the interest of a royalty interest or overriding royalty interest. In Colorado the working interest must bear production costs as well as post production costs such as transportation of gas or carbon dioxide to the commercial marketplace. Free from such costs are the royalty interest and the overriding royalty interest which are entitled to royalty value determined at the location of the commercial marketplace. *Rogers v. Westerman Farm Co.*, 29 P.3d 887 (Colo. 2001).

Bridwell and Ptasynski raised this issue with the Coalition and Coalition counsel and the decision was made by the Coalition and Coalition counsel to abandon Bridwell and Ptasynski. Bridwell and Ptasynski filed Motions to Intervene in the Coalition case and the overriding royalty class action based upon the inadequacy of representation by the named class representative, Rutter & Wilbanks, and due to the attorneys' conflicts of interests. The requests to

intervene were made in August of 2001 before any settlement had been negotiated and before any class action had been conditionally certified.

Adequacy of representation is a fundamental requirement in every class action and in other cases where intervention is sought. This Court has held that Rule 24(a)(2) gives a member of an association the right to intervene when the member's interest is not adequately represented by existing parties. In *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972), the Court held that where a union member's "lawyer" failed to protect his interests he had the right to intervene. Even higher standards are imposed upon class representatives in federal class actions which require the named party to fairly and adequately protect the interests of class members. This burden is of fundamental importance in the context of a global settlement of a nationwide class action. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1999).

In this case, Rutter & Wilbanks was the sole class representative for all overriding royalty owners in the class but it was unable to represent any class member. Rutter & Wilbanks executed the Agency Agreement which gave management and settlement authority for all claims to the Coalition which was controlled by working interests. The Agency Agreement was prepared by Mr. Crowley who was a working interest owner in the McElmo Dome. Mr. Crowley was also an attorney for the working interest owner class action and a named party in the working interest class action through his partnership. Under the Agency Agreement, all authority for settlement and management of the overriding royalty class action was given to someone controlled by McElmo Dome working interests, the Coalition.

The Agency Agreement gave management control for the three class actions; working interests, royalty interests, and overriding royalty interests; to the Coalition which was controlled by working interests. The interests and claims of working interest owners are adverse to the interests and claims of overriding royalty interest owners. Working interests must bear costs while overriding royalty interests are cost free. This inherent and structural conflict of interest was never disclosed when the Coalition lawyers negotiated the aggregate settlement of the Coalition case and the three class actions. The result was the Coalition and its lawyers agreed to a global settlement which greatly benefited the working interest owners, but sacrificed the very valuable claims and interests of the overriding royalty owner class and the royalty owner class.

The damage was increased by the requirement that the "no transportation" claims be released by royalty owners which was a claim that had never been raised in any of the cases. The representation by Rutter & Wilbanks was inadequate with respect to any claim that was not asserted in the class action complaint. *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981). The lack of adequate representation is further aggravated when the settlement is an aggregate settlement under the direction of the same lawyers which represent multiple interests which conflict with each other. In this case, Mr. Cogswell, Mr. Crowley and Mr. Hjelmfelt were the lawyers for the Coalition; were the lawyers for named parties who had signed Agency Agreements; were the lawyers for the three class action representatives; were the lawyers for the unnamed working interest class action members; were the lawyers for the unnamed royalty interest class action members; and were the lawyers for the unnamed overriding

royalty owners. Under the Agency Agreement created by working interest owner Crowley, the authority to settle and manage all four cases belonged to the Coalition. The inadequate representation by the class representatives and the conflicts of interest between the parties and the lawyers create a situation that requires reversal under the authority of this Court in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

In this case the conflict of interest is much greater in the context of an aggregate settlement because working interests are directly adverse to royalty interests. The settlement pitted the Coalition and class action working interest owners who must bear costs against the royalty and overriding royalty interest owners whose royalties are to be free of costs. Any settlement of a class action where there exists such a conflict of interest between one group that may be forced to pay a portion of damages to another group that would benefit from such payment is suspect. *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682 (7th Cir. 1986).

II. The Petitioners Have Standing To Intervene In the Coalition Case And The Class Action To Protect Their Existing Claims Involved In The Cases.

There was no question in the cases below that the Coalition had standing to pursue claims of its members. However, the standing of the Coalition to pursue litigation on behalf of its members derives from the standing the members had to sue in their own right. *International Union, United Auto. v. Brock*, 477 U.S. 274 (1986). All of the Petitioners suffered actual injuries as a result of the unlawful pricing and unlawful deduction of transportation charges from their McElmo Dome overriding royalties. The injuries

existed at the time the lawsuits were filed; the injuries were caused by the Shell and Mobil defendants both in the Coalition case and the overriding royalty owner class action and the injuries would be redressed by a favorable decision. The requirements for standing in the cases below were satisfied. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

Intervention of right in the Coalition case was appropriate for Bridwell and Ptasynski after the Coalition took actions to impede their legally cognizable interests from being presented to the court. The Coalition was the association that received substantial funds from its members, Bridwell and Ptasynski, to pursue their pricing claims. The Coalition and its counsel violated fiduciary duties requiring them to pursue claims for Bridwell and Ptasynski. Neither Bridwell nor Ptasynski were aware of the need to intervene until they were subjected to the hostile and adverse actions of the Coalition and the lawyers Cogswell, Crowley and Hjelmfelt that were to represent them. *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972).

Bridwell and Ptasynski's interests in the Coalition and in any recovery by the Coalition was more than sufficient to justify their intervention in the Coalition case. Bridwell and Ptasynski paid over $200,000 to have their pricing claims litigated. They had significantly protectable legal interests and were entitled to intervene as a matter of right when it became clear that the existing parties were taking positions adverse to their interests rather than representing their interests. *Mountain Top Condominium Association v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361 (3rd Cir. 1995). The injuries to Bridwell and Ptasynski could not be more clear; they have lost the right that they paid for to sue on their claims in the Denver federal district court which was

the forum of their choice. The requirements for standing to pursue their claims were satisfied by Bridwell and Ptasynski. *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72 (1991).

The Tenth Circuit's refusal to allow an aggrieved party with substantial interests directly involved in the cases to intervene imposes a greater burden than this Court allowed in *Devlin v. Scardelletti*, 536 U.S. 1 (2002). Petitioners in the cases below complied with the requirements mandated by the Tenth Circuit in *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993). This Court has overruled the decision regarding intervention as a requirement to appeal a class action settlement. To refuse Petitioners the opportunity to intervene in the cases involving their interests conflicts with this Court's ruling that intervention in a class action by a non party is not required to challenge the settlement of the class action. *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

Bailey and Gray were entitled to rely upon the reasonable expectation that they would have their claims against Shell heard in the Denver court as a result of the notices sent to them in the class action. Both are Colorado residents and Colorado was the forum of choice and the most appropriate forum as the McElmo Dome Unit is a Colorado carbon dioxide unit which was unitized under Colorado law. Bailey and Gray followed the directions provided in the court ordered notices for entering appearances so that their claims could be heard. The denial of their motion to intervene clearly established their procedural standing. *Cella v. Togum Constructeur Ensemleier*, 173 F.3d 909 (3rd Cir. 1999). *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72 (1991). Bailey and Gray filed their appearances and intervention requests as soon as

possible after receiving the class notices and well within the deadline provided in the notices. Although the class action was filed in September of 2000; Bailey and Gray did not know of the conditional certification of an overriding royalty class until they received notice of the action in mid December of 2001 and could not be expected to act until they received the notices. *Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877, 881 (7th Cir. 2000).

As a result of the denial of their Motions to Intervene, due process was denied the Petitioners because they were prevented from participating in any respect in the proceedings below. They were not allowed to participate in the cases to have their claims heard or participate in any manner regarding the adequacy of representation by the Coalition or class representative, the adequacy of representation by Coalition counsel or class counsel, the certification of the class or the fairness of the terms of the aggregate settlement that was proposed thereafter.

This Court should grant the writ.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectively submitted,

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APPENDIX

APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED JANUARY 2, 2003

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 01-1565

(D. Colorado)
(D.C. No. 00-Z-1854

RUTTER & WILBANKS CORP.; ELLIOTT A. RIGGS; WILLIAM R. THURSTON, Trustee; GORDON TANNER; WALTER K. ARBUCKLE TRUST; ERIC B. WELLS; KEVIN C. WELLS; CHARLES R. WIGGINS; KEN KAMON,

Plaintiffs - Appellees,

v.

SHELL OIL COMPANY; SHELL WESTERN E & P, INC.; MOBIL OIL CORPORATION; MOBIL PRODUCING TEXAS & NEW MEXICO, INC.; MOBIL EXPLORATION & PRODUCING U.S., INC.; EXXON MOBIL, INC.; CORTEZ PIPELINE COMPANY, a partnership; SHELL CO_2 COMPANY, LTD., a Texas limited partnership; KINDER MORGAN CO_2 COMPANY, a Texas limited partnership,

Defendants - Appellees,

BRIDWELL OIL COMPANY and HARRY PTASYNSKI,

Applicants in Intervention - Appellants.

Appendix A

No. 01-1567

(D. Colorado)
(D.C. No. 96-Z-2451)

CO_2 CLAIMS COALITION, LLC, named as "United States Government," a Colorado limited liability company,

Plaintiffs - Appellees,

vs.

SHELL OIL COMPANY; SHELL WESTERN E & P, INC.; MOBIL PRODUCING TEXAS & NEW MEXICO, INC.; CORTEZ PIPELINE COMPANY, a partnership,

Defendants - Appellees.

BRIDWELL OIL COMPANY and HARRY PTASYNSKI,

Applicants in Intervention - Appellants.

ORDER AND JUDGMENT*

Before **TACHA**, Chief Judge, **ANDERSON**, and **EBEL**, Circuit Judges.

These consolidated appeals are generally related to the appeal in *Rutter & Wilbanks Corp. v. Shell Oil Co.*, Nos. 02-1220, 02-1221 (10th Cir. filed Dec. 24, 2002), in which we recently affirmed the district court's approval of a settlement

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

of a group of cases arising out of litigation concerning the production of CO_2 contained within the McElmo Dome Unit in Colorado. In these appeals, appellants Harry Ptasynski and Bridwell Oil Co. appeal the denial of their motions to intervene in two of those actions which were the subject of the settlement: *CO_2 Claims Coalition, LLC v. Shell Oil Co.*, No. 96-Z-2451 (D. Colo. filed Oct. 22, 1996) and *Rutter & Wilbanks Corp. v. Shell Oil Co.*, No. 00-Z-1854 (D. Colo. filed Sept. 22, 2000). We affirm.

Ptasynski and Bridwell were owners of overriding royalty interests ("ORIOs") in the McElmo Dome Unit and, as such, were part of the *CO_2 Claims Coalition* lawsuit from the beginning. The *Rutter & Wilbanks* lawsuit sought to represent a class of McElmo Dome ORIOs alleging essentially the same claims regarding the pricing of CO_2 as were alleged in the *CO_2 Claims Coalition* action.

In August, 2001, Ptasynski and Bridwell moved to intervene as plaintiffs under Rule 23 and 24 in *Rutter & Wilbanks Corp.*, and moved to intervene as plaintiffs under Rule 24 in the *CO_2 Claims Coalition* case. The district court denied these motions on multiple grounds: the motions were untimely, Ptasynski's and Bridwell's interests, to the extent they were impaired at all were impaired "by their own actions" and, in any event, were cured by their decision to opt out of the settlement, the Texas actions they have thus far unsuccessfully pursued against the same defendants and alleging essentially the same claims raise potential res judicata problems, and their allegations in support of their claim that Plaintiffs' attorneys cannot adequately represent them are conclusory and nonmeritorious.

Appendix A

The September 2001 settlement agreement settling the *CO_2 Claims Coalition* action and the *Rutter & Wilbanks* action gave Ptasynski and Bridwell the right to opt out of the settlement. On December 4, 2001, Ptasynski and Bridwell filed these appeals from the district court's denial of their motions to intervene. In January 2002, they exercised their right to opt out of the settlement, and specifically reserved all of their claims. *See* Defendants-Appellees' Supp. App. at 2-3.

As indicated, Ptasynski has also been pursuing an action against the same defendants (Shell Oil Co. and Mobil Oil Co.) in Texas alleging essentially the same claims concerning underpayment of royalties on CO_2 gas production on the McElmo Dome Unit. His co-plaintiff in that case is the W.L. Gray Co. ("Gray"), the denial of whose motion to intervene in *Rutter & Wilbanks* we simultaneously affirm. *See Rutter & Wilbanks Corp. v. Shell Oil Co.*, No. 02-1034 (10th Cir. filed Dec. 24, 2002). That Texas action was filed in May 1997, proceeded to trial in August 1999, and resulted in judgment for Shell and Mobil on all Ptasynski's and Gray's claims except a claim for negligent misrepresentation. In February 2002, the Fifth Circuit reversed the trial court's entry of judgment for Ptasynski on the negligent misrepresentation claim and affirmed the judgment in favor of Shell and Mobil on all other claims.

Bridwell has similarly been involved in extensive litigation in various Texas courts, most of which has resulted in rulings adverse to it and in favor of Shell and Mobil. On August 29, 2002, the Texas Supreme Court held that an action involving Bridwell, which had been transferred to the

probate court of Denton County, Texas, had been improperly transferred. Gerald O. Bailey has been a co-defendant and co-plaintiff with Bridwell in a number of these Texas actions. We have simultaneously affirmed the denial of Bailey's motion to intervene in *Rutter & Wilbanks* along with Gray's. *See id.*

Defendants and Plaintiffs in this case argue that Ptasynski and Bridwell lack standing: "Appellants seek to intervene in the *Coalition* and *Rutter & Wilbanks* lawsuits in order to pursue their claims for allegedly underpaid overriding royalties for McElmo Dome CO_2. Because those cases have been settled and Appellants have elected to opt out of the settlement, however, these appeals must be dismissed for lack of standing." Defendants-Appellees' Answer Br. at 7. Alternatively, assuming appellants have standing, Plaintiffs and Defendants argue the trial court correctly denied their motions to intervene because they satisfy none of the requirements for intervention under Fed. R. Civ. P. 24.

We first consider Plaintiffs' and Defendants' argument that Ptasynski and Bridwell lack standing at this point to pursue this appeal. Plaintiffs and Defendants argue that, having opted out of the settlement of the cases with respect to which Ptasynski and Bridwell sought intervention, they thereby lost their standing.

> It is well settled that, in order to show standing necessary to invoke federal court jurisdiction, a party must demonstrate three things:
>
> > (1) "injury in fact," by which we mean an invasion of a legally protected interest that is "(a) concrete and

> particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) a causal relationship between the injury and the challenged conduct, by which we mean that the injury "fairly can be traced to the challenged action of the defendant," and has not resulted "from the independent action of some third party not before the court"; and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the "prospect of obtaining relief from the injury as a result of a favorable ruling" is not "too speculative."

In re Integra Realty Res., Inc., 262 F.3d 1089, 1101 (10th Cir. 2001) (quoting *Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 663-64 (1993)). In *In re Integra*, we held that parties who had opted out of a settlement lacked standing to challenge the settlement because they "lack[ed] any legally protected interest that could support the 'injury in fact' element necessary to demonstrate standing." *Id.* at 1102; *see also In re: Vitamins Antitrust Class Actions*, 215 F.3d 26 (D.C. Cir. 2000) (holding that presumptive class members who had opted out of a settlement had no standing to challenge a specific clause in the settlement). We, and other courts, have recognized a narrow exception to this where nonsettling parties can demonstrate that they will suffer "'plain legal prejudice,' as when 'the settlement strips the party of a legal claim or cause of action.'" *In re Integra*, 262

F.3d at 1102 (quoting *Mayfield v. Barr*, 985 F.2d 1090, 1093 (D.C. Cir. 1993)) (further quotation omitted).

We have also held that "a plaintiff must maintain standing at all times throughout the litigation for a court to retain jurisdiction." *Powder River Basin Res. Council v. Babbitt*, 54 F.3d 1477, 1485 (10th Cir. 1995). Other courts have suggested that the issue is more properly framed as one of mootness: "while it is true that a plaintiff must have a personal interest at stake throughout the litigation of a case, such interest is to be assessed under the rubric of standing at the commencement of the case, and under the rubric of mootness thereafter." *Becker v. Fed. Election Comm'n*, 230 F.3d 381, 386 n.3 (1st Cir. 2000); *see also Steger v. Franco, Inc.*, 228 F.3d 889, 893 (8th Cir. 2000).

Whether framed as an issue of standing or mootness, we agree with Plaintiffs and Defendants that Ptasynski and Bridwell no longer have the requisite personal interest in this action. They seek intervention in two cases which have now settled, and the validity of that settlement has been affirmed on appeal. During the pendency of these appeals from the denial of their motions to intervene, they opted out of that settlement and are, in fact, pursuing their individual claims in Texas courts. They therefore lack any personal stake or interest in the settlement and, more particularly, in the cases which were the object of that settlement.

Alternatively, were they able to identify some interest sufficient to avoid a conclusion of mootness or lack of standing, we would affirm the district court's denials of their motions to intervene, for substantially the reasons set forth in the district court's written orders denying those motions.

AFFIRMED.

Appendix A

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge

APPENDIX B — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED JANUARY 2, 2003

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 02-1034

(D. Colorado)
(D.C. No. 00-Z-1854)

RUTTER & WILBANKS CORP.; ELLIOTT A. RIGGS; WILLIAM R. THURSTON, Trustee; GORDON TANNER; WALTER K. ARBUCKLE TRUST; ERIC B. WELLS; KEVIN C. WELLS; CHARLES R. WIGGINS; KEN KAMON,

Plaintiffs-Appellees,

v.

SHELL OIL COMPANY; SHELL WESTERN E & P, INC.; MOBIL OIL CORPORATION; MOBIL PRODUCING TEXAS & NEW MEXICO, INC.; MOBIL EXPLORATION & PRODUCING U.S., INC.; EXXON MOBIL, INC.; CORTEZ PIPELINE COMPANY, a partnership; SHELL CO_2 COMPANY, LTD., a Texas limited partnership; KINDER MORGAN CO_2 COMPANY, a Texas limited partnership,

Defendants-Appellees,

GERALD O. BAILEY and W.L. GRAY & CO.,

Applicants in Intervention-Appellants.

Appendix B

ORDER AND JUDGMENT*

Before **TACHA**, Chief Judge, **ANDERSON**, and **EBEL**, Circuit Judges.

This appeal is generally related to the appeal in *Rutter & Wilbanks Corp. v. Shell Oil Co.*, Nos. 02-1220, 02-1221 (10th Cir. filed Dec. 24, 2002), in which we recently affirmed the district court's approval of a settlement of a group of cases arising out of litigation concerning the production of CO_2 contained within the McElmo Dome Unit in Colorado. In this appeal, appellants Gerald O. Bailey and the W.L. Gray Co. ("Gray") appeal the denial of their motions to intervene in one of the actions which was settled: *Rutter & Wilbanks Corp. v. Shell Oil Co.*, No. 00-Z-1854 (D. Colo. filed Sept. 22, 2000). We affirm.

Bailey and Gray were owners of overriding royalty interests ("ORIO"s) in the McElmo Dome Unit. The September 2001 settlement agreement settling *Rutter & Wilbanks* and three related cases gave them the right to opt out of the settlement. On January 5 and January 7 of 2002, Gray and Bailey, respectively, opted out of the settlement. On January 10, 2002, they filed motions to intervene in *Rutter & Wilbanks,* which the district court denied essentially on the ground that they were untimely: "[g]iven the length of time this litigation, as an entire matter, has endured thus far,

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

and the late date at which the applicants move for intervention, the Court will deny the motion." Order at 2, Appellants' App. at 22.

Additionally, Gray and Bailey are also involved in litigation in Texas involving the same defendants and claims involving CO_2 production on the McElmo Dome Unit. In fact, Gray is a co-plaintiff in one proceeding with Harry Ptasynski, whose appeal of the denial of virtually identical motions to intervene we simultaneously affirm. *See Rutter & Willbanks Corp. v. Shell Oil Co.*, Nos. 01-1565, 01-1567 (10th Cir. filed Dec. 24, 2002). Bailey is a co-plaintiff and co-defendant in various Texas proceedings with Bridwell Oil Co., whose appeal of the denial of its motions to intervene we affirmed along with Ptasynski's. *See id.*

Plaintiffs and Defendants argue that Bailey and Gray lack standing, having opted out of the settlement before they filed their motions to intervene.

> It is well settled that, in order to show standing necessary to invoke federal court jurisdiction, a party must demonstrate three things:
>
> > (1) "injury in fact," by which we mean an invasion of a legally protected interest that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) a causal relationship between the injury and the challenged conduct, by which we mean that the

> injury "fairly can be traced to the challenged action of the defendant," and has not resulted "from the independent action of some third party not before the court"; and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the "prospect of obtaining relief from the injury as a result of a favorable ruling" is not "too speculative."

In re Integra Realty Res., Inc., 262 F.3d 1089, 1101 (10th Cir. 2001) (quoting *Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 663-64 (1993)). In *In re Integra*, we held that parties who had opted out of a settlement lacked standing to challenge the settlement because they "lack[ed] any legally protected interest that could support the 'injury in fact' element necessary to demonstrate standing." *Id.* at 1102; *see also In re: Vitamins Antitrust Class Actions*, 215 F.3d 26 (D.C. Cir. 2000) (holding that presumptive class members who had opted out of a settlement had no standing to challenge a specific clause in the settlement). We, and other courts, have recognized a narrow exception to this where nonsettling parties can demonstrate that they will suffer "'plain legal prejudice,' as when 'the settlement strips the party of a legal claim or cause of action.'" *In re Integra*, 262 F.3d at 1102 (quoting *Mayfield v. Barr*, 985 F.2d 1090, 1093 (D.C. Cir. 1993)) (further quotation omitted).

Bailey and Gray assert that they "have not sought 'limited' intervention to challenge the proposed settlement"

but rather ask only that "they be allowed to intervene ***as parties*** in the case so that they may litigate their claims and protect their interests." Appellants' Reply Br. at 5. We agree with the Plaintiffs and Defendants in this case that, once they opted out of the settlement, Bailey and Gray lost any legally cognizable interest in the proceedings into which they wish to intervene. Further, they do not argue that they have suffered plain legal prejudice in that they have been stripped by the settlement of any legal claim or cause of action; indeed, they have been actively pursuing claims against Defendants in Texas.

Alternatively, were they able to identify some interest sufficient to confer standing, we would hold that the district court did not abuse its discretion in finding their motions to intervene untimely. *See Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1249 (10th Cir. 2001) ("We generally review a district court's ruling on the timeliness of a motion to intervene under an abuse of discretion standard.").

AFFIRMED.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED AND FILED APRIL 19, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinshienk

Civil Action No. 96-Z-2451 (MJW)

CO_2 CLAIMS COALITION, LLC, a Colorado limited liability company,

Plaintiff,

v.

SHELL OIL COMPANY, SHELL CO_2 COMPANY, LTD., aka KINDER MORGAN CO_2 COMPANY; L.P., SHELL WESTERN E & P, INC., MOBIL PRODUCING TEXAS AND NEW MEXICO, INC., and CORTEZ PIPELINE COMPANY, a partnership,

Defendants,

v.

HARRY PTASYNSKI,

Applicant Intervenor,

and

BRIDWELL OIL COMPANY,

Applicant Intervenor.

Appendix C

ORDER

The matters before the Court are two motions to intervene, one filed by applicant intervenor Harry Ptasynski (Ptasynski), and the other by Bridwell Oil Company (Bridwell), on August 6, 2001, and August 9, 2001, respectively.[1] On November 13, 2001, these motions were denied by Minute Order, in which the Court stated that a written order would be forthcoming. This order addresses those motions, and provides the reasoning behind the denial.

In 1996, plaintiff CO_2 Claims Coalition (Coalition) was formed for the purpose of pursuing this lawsuit,[2] which concerns alleged royalty underpayments by defendants for carbon dioxide gas (CO_2) production from the McElmo Dome field in Colorado. Since its filing, this case has been litigated actively. In 2000, three additional cases were filed (related cases), in which plaintiffs assert claims on behalf of certain types of interest owners in the McElmo Dome Unit: overriding royalty interest owners (ORRIOs), small share

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1. The Court will discuss the motions simultaneously as the arguments advanced in each are basically identical. Differences will be noted when necessary.

2. Parties seeking membership in the Coalition were required to assign their claims to the Coalition for adjudication. The Assignment and Subscription Agreement provides "the undersigned hereby assigns all of his claims against any person or entity arising from the wrongful pricing of CO_2 produced and sold from the McElmo Dome Field . . ." By Amendment Agreement, the assignment includes claims arising from the "wrongful setting of the tariff" of Cortez Pipeline. There are approximately 76 members in the Coalition.

working interest owners (SSWIOs), and royalty interest owners (RIOs).[3]

In early August 2001, following mediation efforts, the parties in this case and the three additional cases agreed to settlement, the terms of which resolve this case, the three related cases, and a False Claims Act case filed in 2000.[4] The Court has preliminarily approved the Settlement Agreement, conditionally certified as class actions the three related cases, appointed James M. Lyons, Esq., as Fairness Expert, approved the Class Notice, and preliminarily approved the allocation of the settlement fund, the present value of future benefits, litigation costs, and management fees. The Settlement Agreement provides that plaintiffs and class members choosing to accept the settlement release any and all claims that were or could have been asserted, including future claims.[5] The Agreement also includes a contractual opt-out provision[6] for applicant intervenors Ptasynski and Bridwell, negotiated for by their attorney, which allows them to opt out of the settlement, leaving them free to pursue their claims elsewhere. In February 2002, the

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3. Civil Action No. 00-Z-1854, *Rutter & Wilbanks Corp., et al. v. Shell. et al.;* Civil Action No. 00-Z-1855, *Thomas E. Watson, et al. v. Shell, et al.;* Civil Action No. 00-Z-1856, *Margaret Ann Ainsworth, et al. v. Shell, et al.*

4. Civil Action No. 00-Z-1220. *Crowlev v. Shell. et al.*

5. Settlement Agreement, § 1, ¶ 1.77, and § 7.

6. Settlement Agreement, § 13.22.

parties filed Plaintiffs' Status Report Re Exclusion And Opt Out Request and Notice Of Submission Of Exclusion Requests, by which the Court is advised that both Ptasynski and Bridwell have exercised their rights to opt out of the Settlement Agreement and the terms thereof.

Ptasynski and Bridwell[7] move for intervention under Fed. R. Civ. P. 24(a)(2) as ORRIOs via federal leases in the CO_2 at issue. They wish to assert claims for the improper pricing of carbon dioxide produced and sold from the McElmo Dome Unit. In 1996, they became members of the Coalition,[8] and assigned their claims accordingly. Despite this assignment, both applicant intervenors filed cases in Texas against defendants in 1997.

In *Ptasynski and W.L. Gray & Co. v. Shell Western E&P, Inc., et al.*, Case No. 97-CV-1208-R, Ptasynski filed a number of claims arising from the same the set of circumstances giving rise to the actions here: fraudulent tax returns, fraud, fraudulent concealment, civil conspiracy, breach of contract, negligence per se, negligent misrepresentation, and

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7. Bridwell files the Complaint In Intervention on its own behalf and on behalf of Gerald O. Bailey. Mr. Bailey previously owned oil and gas leases, but in 1973 and 1974, assigned all of his right, title and interest in the leases, subject to an overriding royalty reservation, to Bridwell Oil Company. Bridwell subsequently assigned its rights, reserving its overriding royalty interest, to defendants.

8. There was some dispute as to whether or not Bridwell was a Coalition member when it filed the motion to intervene. At this time, however, it appears from the documentation that Bridwell was a member.

declaratory judgment.[9] According to him however, he did not pursue claims arising from alleged wrongful pricing of CO_2 produced and sold from the McElmo Dome. Tried to the bench, plaintiffs prevailed on the negligent misrepresentation and declaratory judgment claims, and were awarded damages.[10] All other claims were in favor of defendants. The negligent misrepresentation claim asserted royalty underpayments arising from the brochure used by defendant Shell for the development and marketing of McElmo Dome CO_2, in which Shell represented that plaintiffs and other royalty interest owners would not bear transportation costs. Plaintiffs contended that in calculating royalty payments, defendants deducted transportation costs. Defendants appealed to the Fifth Circuit.

In 1997, Bridwell also filed a federal case in Texas, asserting claims relating to tax issues.[11] All claims were disposed of by summary judgment, and the ancillary royalty

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9. Ptasynski's co-plaintiff, W.L. Gray & Co., moved for intervention in Civil Action No. 00-Z-1854, the ORRIO case, on January 10, 2002, which was denied by written Order on January 17, 2002.

10. The Court awarded Ptasynski $388,000 for transportation charges deducted by Shell and Mobil, and in entering declaratory judgment in favor of plaintiffs, ordered that Shell and Mobil shall not deduct any transportation charges to West Texas from the overriding royalty payments.

11. Bridwell's co-plaintiff in that case, Mr. Gerald Bailey, moved for intervention in Civil Action No. 00-Z-1854, the ORRIO case, on January 10, 2002. The Court denied the motion by Order, filed January 17, 2002.

underpayment claims were dismissed for lack of subject matter jurisdiction. In 1998, defendants filed a declaratory judgment action in Texas state court against Bridwell, who pleaded counterclaims.[12] In that case, only Bridwell's fraud counterclaim survived summary judgment. That claim apparently has been transferred to Denton County probate court, the same court in which two interest owner actions arising from the same set of circumstances are filed.[13] Bridwell is not a plaintiff in either of those two cases. Several issues are on appeal in the cases filed in Denton County court.

Applicant intervenors claim that as ORRIOs they have an interest in this case, and that disposition of the matter may impede or destroy their ability to protect their interests. They further assert that their interests are no longer adequately represented by the Coalition because of the alleged July 1, 2001, termination date, nor by plaintiff's counsel because they are dominated and controlled by the working interest owners. They allege that plaintiff's attorneys engaged in champerty by exerting undue influence over the Coalition, resulting in improper solicitation of legal business and an unauthorized agency agreement committing the Coalition's resources to finance the litigation in three related cases.

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12. The Court does not have a copy of Bridwell's Answer and counterclaims.

13. *Shores v. Mobil*, No. GC-99-01184; *First State Bank of Denton v. Mobil*, No. 8552-01. *Shores* is an ORRIO class case, and *First State* is a RIO case. The court there has yet to certify the RIO class, but indicates that it will. These Texas cases appear to be competing with the class cases here.

Appendix C

The crux of Ptasynski's and Bridwell's motions appears to be a "no transportation cost" claim, which has never been asserted in the instant case or any of the three related cases. They base their argument on *Rogers v. Westerman*, 29 P.3d 887 (Colo. 2001), and the fact that Ptasynski's success in Texas on his negligent misrepresentation and declaratory judgment claims entitled him to damages based on defendants' improper deduction of transportation costs in calculating royalties.

According to the would-be intervenors, *Rogers* makes viable a valuable "no transportation cost" claim, which goes to the calculation of royalties. *Rogers* indicates, although it is not entirely on point in this case, that the deduction of transportation costs from royalties is improper when the gas is not marketable at the well.[14] *Id.* at 900. Therefore, if *Rogers* applies, as Ptasynski and Bridwell contend that it does, they are entitled to the assertion of such a claim, which in their eyes is worth millions of dollars. Since the Settlement Agreement releases any and all claims not asserted, Ptasynski and Bridwell, if they agree to the settlement, are foreclosed from bringing that claim in any case.

Both Ptasynski and Bridwell have alleged that plaintiff's counsel are SSWIOs,[15] and as such are dominated and

14. Gas that is not marketable at the well includes gas that is not in a marketable condition, and/or gas that is not acceptable for a commercial market.

15. In January 2002, in response to allegations that plaintiff's counsel are SSWIOs, the Court issued orders to show cause as to why plaintiff's counsel should not be disqualified. After receiving papers from counsel addressing this matter, the Court discharged the orders, finding no merit to allegations of collusion.

controlled by defendants who are working interest owners in the McElmo Dome Unit. Working interest owners bear transportation costs to RIOs and ORRIOs, meaning that a "no transportation cost" claim would require both plaintiff's counsel, assuming they are SSWIOs, and defendants to pay money to RIOs and ORRIOs for transportation costs previously deducted. Therefore, according to applicant intervenors, the Settlement Agreement's release of the "no transportation cost" claim is evidence of collusion between plaintiff's counsel and defendants because it relieves both of substantial transportation cost liability.

Plaintiff and defendants oppose intervention for similar reasons. Plaintiff argues that the facts on which the applicant intervenors base their motions are false as demonstrated by its attached exhibits. Further, Ptasynski and Bridwell have not met their burden to warrant intervention because the motions are untimely, their interests are not impaired, and they are adequately represented.

Defendants argue the following. First, Ptasynski and Bridwell's motions to intervene are untimely because they have had five years to assert their claims, here or otherwise. Second, Ptasynski's interest here is foreclosed by his Texas suit due to res judicata and the prohibition against claim splitting. Alternatively, even if Ptasynski and Bridwell have an interest, it is protected by the opt-out election in the Settlement Agreement. Third, they have no standing to intervene because they are already adequately represented.

The Tenth Circuit enumerates four factors for intervention: 1) the application is timely; 2) the applicant

claims an interest relating to the property or transaction which is the subject of the action; 3) the applicant's interest may as a practical matter be impaired or impeded; and 4) the applicant's interest is not adequately represented by existing parties. *Coalition Of Arizona/New Mexico Counties v. DOI*, 100 F.3d 837, 840 (10th Cir. 1996).

In considering whether a motion for intervention is timely, the trial court must evaluate timeliness in light of all the circumstances. *NAACP v. New York*, 413 U.S. 345, 366 (1973). "The test for timeliness is essentially one of reasonableness: potential intervenors need to be reasonably diligent in learning of a suit that might affect their rights, and upon so learning they need to act reasonably promptly." *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995). The timeliness determination "requires consideration of all the circumstances of a case and not just the point to which the suit has progressed." *Ragsdale v. Turnock*, 941 F.2d 501, 504 (7th Cir. 1991). The *Ragsdale* court outlined four factors for consideration: 1) the length of time the intervenor knew or should have known of his or her interest in the case; 2) the prejudice to the original party caused by the delay; 3) the resulting prejudice to the intervenor; and 4) any unusual circumstances. *Id.*

At the time the Court denied the motions to intervene, issues of timeliness and impairment of interests were germane to the Court's ruling. For example, Bridwell, whether or not it was a Coalition member, and Ptasynski were fully aware of this litigation from its inception and the claims asserted or, more importantly, not asserted therein. Plaintiff points out that this case was set to go to trial first in April, 2001,

then in July 2001, and finally in September, 2001, but that Ptasynski and Bridwell waited until August 2001, to file their motions to intervene.

Both Ptasynski and Bridwell are ORRIOs in this matter, and were Coalition members at the time they filed these motions. Any impairment of their interests seems to have been caused by their own actions, and not plaintiff's attorneys. By filing their cases in Texas, they have created difficulties for themselves here. The Court notes that Bridwell's actions concerning its supposed membership in the Coalition are conflicting and confusing at best. On one hand, Bridwell acts like it is not a Coalition member, and on the other, it does. It's curious that these applicant intervenors chose to pursue claims in Texas relating to CO_2 royalty underpayments arising from the same set of circumstances, while having assigned their rights and claims to the Coalition for adjudication. This course of action poses problems. Regardless, any potential impairment is remedied by the opt-out right preserved in the Settlement Agreement. In January 2002, both chose to exercise this right, so that they are, in fact, free to pursue their claims however they see fit.

Issues concerning res judicata may have merit as well. It appears that plaintiff's counsel requested from applicant intervenors' counsel, who represents both Ptasynski and Bridwell in the Texas cases, guidance as to what to do with Bridwell's claims here. The exhibits plaintiff attached to its response demonstrate that no guidance was given despite plaintiff's efforts. As to whether res judicata actually negates any alleged interest that Ptasynski and Bridwell may have, the Court will not make a determination.

Appendix C

One other event reaffirms the appropriateness of denial: the Fifth Circuit's decision in the *Ptasynski* case. Applicant intervenors consider that *Rogers* in conjunction with Ptasynski's success in Texas entitle them to a "no transportation cost" claim here. Unfortunately for applicant intervenors, the Fifth Circuit reversed the lower court's judgment in *Ptasynski and W.L. Gray & Co. v. Shell Western E&P Inc., et al.*, No. 99-11049, on the negligent misrepresentation and declaratory judgment claims, thereby making the validity of a "no transportation cost" claim on the basis of the brochure illusory. Perhaps because they have not enjoyed success in their Texas suits to the extent hoped for, Ptasynski and Bridwell want another bite of the apple here, which of course they cannot have. Furthermore, the uncertainty of whether *Rogers* would trigger a stand alone "no transportation cost" claim in this case supports the appropriateness of denying these motions to intervene.

As to other allegations made by Ptasynski and Bridwell, the Court finds these statements conclusory and without merit. There is no evidence that plaintiff's attorneys engaged in champerty, improper solicitation of business, exertion of undue influence over Coalition managers or members, or collusion and alignment with defendants in reaching settlement or the terms thereof. Lastly, the Coalition did not terminate on July 1, 2001, as Ptasynski and Bridwell contend. Accordingly, for all the reasons articulated herein, it is

ORDERED that the Court affirms the previous denial of applicant intervenor Ptasynski's Motion To Intervene As A Plaintiff Under Rules 23 and 24. It is

Appendix C

FURTHER ORDERED that the Court affirms the previous denial of applicant intervenor Bridwell Oil Company's Motion To Intervene As A Plaintiff Under Rules 23 and 24.

DATED at Denver, Colorado, this 19 day of April, 2002, *nunc pro tunc* March 11, 2002.

BY THE COURT:

s/ Zita L. Weinshienk
ZITA L. WEINSHIENK, Senior Judge
United States District Court

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED AND FILED APRIL 19, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinshienk

Civil Action No. 00-Z-1854 (MJW)

RUTTER & WILBANKS CORP., et al.,

Plaintiffs,

v.

SHELL OIL COMPANY, et al.,

Defendants,

v.

HARRY PTASYNSKI,

Applicant Intervenor,

and

BRIDWELL OIL COMPANY,

Applicant Intervenor.

Appendix D

ORDER

The matters before the Court are two motions to intervene, one filed by applicant intervenor Harry Ptasynski (Ptasynski), and the other by Bridwell Oil Company (Bridwell), on August 6, 2001, and August 9, 2001, respectively.[1] These motions were denied on November 13, 2001, by Minute Order, in which the Court stated that a written order would be forthcoming. This order addresses those motions, and provides the reasoning behind the denial.

This case has its origins in *CO_2 Claims Coalition, LLC. v. Shell Oil Company, et al.*, Civil Action No. 96-Z-2451 (CO_2 case). In that case, plaintiff CO_2 Claims Coalition (Coalition) filed suit against defendants Shell and Mobil, alleging royalty underpayments for carbon dioxide gas (CO_2) production from the McElmo Dome field in Colorado. Plaintiff and proposed class members in that case first moved for class certification in October 1997, and again in June 1999. The Court ultimately denied class certification on March 22, 2000, finding that alleged class members' interests were too divergent to warrant certification. That decision gave rise to the filing of three related cases,[2] one of them being

1. The Court will discuss the motions simultaneously as the arguments advanced in each are basically identical. Differences will be noted when necessary.

2. Civil Action Nos. 00-Z-1854, 00-Z-1855, 00-Z-1856 (three related cases), in which there are class representatives, named plaintiffs, and unnamed class members. The interests owned by plaintiffs in these cases are overriding royalty interests, small share working interests, and royalty interests, respectively.

the instant case, *Rutter & Wilbanks Corp., et al. v. Shell, et al.*, in which plaintiffs are overriding royalty interest owners (ORRIOs) in CO_2 production from the McElmo Dome area.

Plaintiffs and defendants have litigated the original CO_2 case for almost six years, and the related cases for about a year and a half. In early August 2001, following mediation efforts, the parties agreed to settlement, the terms of which resolve the CO_2 case, the three related cases, and a False Claims Act case filed in 2000.[3] The Court has preliminarily approved the Settlement Agreement, conditionally certified as class actions the three related cases, appointed Mr. James M. Lyons, Esq., as Fairness Expert, approved the Class Notice, and preliminarily approved the allocation of the settlement fund, the present value of future benefits, litigation costs, and management fees. The Settlement Agreement provides that plaintiffs and class members choosing to accept the settlement release any and all claims that were or could have been asserted, including future claims.[4] The Agreement also includes a contractual opt-out provision[5] for applicant intervenors Ptasynski and Bridwell, negotiated for by their attorney, which allows them to opt out of the settlement, leaving them free to pursue their claims elsewhere. In February 2002, the parties filed Plaintiffs' Status Report Re Exclusion And Opt Out Request and Notice Of Submission Of Exclusion Requests, by which the Court is

3. Civil Action No. 00-Z-1220, *Crowley v. Shell, et al.*

4. Settlement Agreement, § 1, ¶ 1.77, and § 7.

5. Settlement Agreement, § 13.22.

advised that both Ptasynski and Bridwell have exercised their rights to opt out of the Settlement Agreement and the terms thereof.

Ptasynski and Bridwell[6] move for intervention under Fed. R. Civ. P. 24(a)(2) as overriding royalty interest owners (ORRIOs) via federal leases in the CO_2 at issue. They wish to assert claims for the improper pricing of carbon dioxide produced and sold from the McElmo Dome Unit. In 1996, both became members of the Coalition[7] for purposes of pursuing the lawsuit in the original CO_2 case, and assigned their claims accordingly. Despite this assignment, both applicant intervenors filed cases in Texas against defendants in 1997.

In *Ptasynski and W.L. Gray & Co. v. Shell Western E&P, Inc., et al.*, Case No. 97-CV-1208-R, Ptasynski filed a number of claims arising from the same the set of circumstances giving rise to the actions here: fraudulent tax returns, fraud, fraudulent concealment, civil conspiracy, breach of contract, negligence per se, negligent

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6. Bridwell files the Complaint In Intervention on its own behalf and on behalf of Gerald O. Bailey. Mr. Bailey previously owned oil and gas leases, but in 1973 and 1974, assigned all of his right, title and interest in the leases, subject to an overriding royalty reservation, to Bridwell Oil Company. Bridwell subsequently assigned its rights, reserving its overriding royalty interest, to defendants.

7. There is some dispute as to whether or not Bridwell was a Coalition member when it filed the motion to intervene. At this time, however, it appears from the documentation that it was a member.

misrepresentation, and declaratory judgment.[8] According to him however, he did not pursue claims arising from alleged wrongful, pricing of CO_2 produced and sold from the McElmo Dome. Tried to the bench, plaintiffs prevailed on the negligent misrepresentation and declaratory judgment claims, and were awarded damages.[9] All other claims were in favor of defendants. The negligent misrepresentation claim asserted royalty underpayments arising from the brochure used by defendant Shell for the development and marketing of McElmo Dome CO_2, in which Shell represented that plaintiffs and other royalty interest owners would not bear transportation costs. Plaintiffs contended that in calculating royalty payments, defendants deducted transportation costs. Defendants appealed to the Fifth Circuit.

In 1997, Bridwell also filed a federal case in Texas, asserting claims relating to tax issues.[10] All claims were disposed of by summary judgment, and the ancillary royalty underpayment claims were dismissed for lack of subject matter jurisdiction. In 1998, defendants filed a declaratory

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8. Ptasynski's co-plaintiff, W.L. Gray & Co., moved for intervention in this case on January 10, 2002, which was denied by written Order on January 17, 2002.

9. The Court awarded Ptasynski $388,000 for transportation charges deducted by Shell and Mobil, and in entering declaratory judgment in favor of plaintiffs, ordered that Shell and Mobil shall not deduct any transportation charges to West Texas from the overriding royalty payments.

10. Bridwell's co-plaintiff in that case, Mr. Gerald Bailey, moved for intervention in this case on January 10, 2002. The Court denied the motion by Order, filed January 17, 2002.

judgment action in Texas state court against Bridwell, who pleaded counterclaims. In that case, only Bridwell's fraud claim survived summary judgment. That claim apparently has been transferred to Denton County probate court, the same court in which two interest owner actions are filed.[11] Bridwell is not a plaintiff in either of those two cases. Several issues are on appeal in the cases filed in Denton County court.

Applicant intervenors claim that as ORRIOs they have an interest in this case, and that disposition of the matter may impede or destroy their ability to protect their interests. They further assert that their interests are no longer adequately represented by the Coalition because of the alleged July 1, 2001, termination date, or by plaintiffs' counsel because they are dominated and controlled by working interest owner defendants. They allege that plaintiffs' attorneys engaged in champerty by exerting undue influence over the Coalition, resulting in improper solicitation of legal business and an unauthorized agency agreement committing the Coalition's resources to finance the litigation in this case.

The crux of Ptasynski's and Bridwell's motions appears to be a "no transportation cost" claim, which has never been asserted in the original CO_2 case or any of the three related cases. They base their argument on *Rogers v. Westerman*, 29 P.3d 887 (Colo. 2001), and the fact that Ptasynski's success in Texas on his negligent misrepresentation and declaratory

11. *Shores v. Mobil*, No. GC-99-01184; *First State Bank of Denton v. Mobil*, No. 8552-01. *Shores* is an ORRIO class case, and *First State* is a royalty interest owner (RIO) case. The court there has yet to certify the RIO class, but indicates that it will. These Texas cases appear to be competing with the class cases here.

judgment claims entitled him to damages based on defendants' improper deduction of transportation costs in calculating royalties.

According to the would-be intervenors, *Rogers* is important because it makes viable a valuable "no transportation cost" claim, which goes to the calculation of royalties. *Rogers* indicates, although it is not entirely on point in this case, that the deduction of transportation costs is improper when the gas is not marketable at the well.[12] *Id.* at 900. Therefore, if *Rogers* applies, as Ptasynski and Bridwell contend that it does, they are entitled to the assertion of such a claim, which in their eyes is worth millions of dollars. Since the Settlement Agreement releases any and all claims not asserted, Ptasynski and Bridwell, if they agree to the settlement, are foreclosed from bringing that claim in any case.

Both Ptasynski and Bridwell have alleged that plaintiffs' counsel are small share working interest owners (SSWIOs),[13] and are dominated and controlled by defendants who are working interest owners in the McElmo Dome Unit. Working interest owners bear transportation costs to royalty interest

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12. Gas that is not marketable at the well includes gas that is not in a marketable condition, and/or gas that is not acceptable for a commercial market.

13. In January 2002, in response to allegations that plaintiffs' counsel are SSWIOs, the Court issued orders to show cause as to why plaintiffs' counsel should not be disqualified. After receiving papers from counsel addressing this matter, the Court discharged the orders, finding no merit to allegations of collusion.

owners (RIOs) and ORRIOs, meaning that a "no transportation cost" claim would require both plaintiffs' counsel, assuming they are SSWIOs, and defendants to pay money to RIOs and ORRIOs for transportation costs previously deducted. Therefore, according to applicant intervenors, the Settlement Agreement's release of the "no transportation cost" claim is evidence of collusion between plaintiffs' counsel and defendants because it relieves both plaintiffs' counsel and defendants of substantial transportation cost liability.

Plaintiffs and defendants oppose intervention for similar reasons. Plaintiffs argue that the facts on which the applicant intervenors base their motions are false as demonstrated by the attached exhibits. Further, Ptasynski and Bridwell have not met their burden to warrant intervention because their motions are untimely, their interests are not impaired, and they are adequately represented.

Defendants argue the following. First, as Coalition members, Ptasynski and Bridwell are excluded from the ORRIO class, so that this suit does not adjudicate their rights. Second, their interests are protected by the opt-out election in the Settlement Agreement. Defendants also argue that these motions to intervene are untimely as Ptasynski and Bridwell have had at least five years to assert these claims here or independently. Lastly, res judicata may bar claims set forth by the applicant intervenors because they could have been brought in the Texas suits, but were not.

The Tenth Circuit enumerates four factors for intervention: 1) the application is timely; 2) the applicant

claims an interest relating to the property or transaction which is the subject of the action; 3) the applicant's interest may as a practical matter be impaired or impeded; and 4) the applicant's interest is not adequately represented by existing parties. *Coalition Of Arizona/New Mexico Counties v. DOI*, 100 F.3d 837, 840 (10th Cir. 1996).

In considering whether a motion for intervention is timely, the trial court must evaluate timeliness in light of all the circumstances. *NAACP v. New York*, 413 U.S. 345, 366 (1973). "The test for timeliness is essentially one of reasonableness: potential intervenors need to be reasonably diligent in learning of a suit that might affect their rights, and upon so learning they need to act reasonably promptly." *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995). The timeliness determination "requires consideration of all the circumstances of a case and not just the point to which the suit has progressed." *Ragsdale v. Turnock*, 941 F.2d 501, 504 (7th Cir. 1991). The *Ragsdale* court outlined four factors for consideration: 1) the length of time the intervenor knew or should have known of his or her interest in the case; 2) the prejudice to the original party caused by the delay; 3) the resulting prejudice to the intervenor; and 4) any unusual circumstances. *Id.*

At the time the Court denied the motions to intervene, issues of timeliness and impairment of interests were germane to the Court's ruling. For example, Bridwell, whether or not it was a Coalition member, and Ptasynski were fully aware of this litigation from its inception and the claims asserted or, more importantly, not asserted therein. Plaintiff points out that this case was set to go to trial first in April, 2001,

then in July 2001, and finally in September, 2001, but that Ptasynski and Bridwell waited until August 2001, to file their motions to intervene.

Both Ptasynski and Bridwell are ORRIOs in the CO_2 at issue. However, as Coalition members when they filed the motion, they were excluded as class members from this case, and, therefore, had no interest in this class action. The Court notes that any impairment of their interests seems to have been caused by their own actions, and not plaintiffs' attorneys. By filing their cases in Texas, they have created difficulties for themselves here. It's curious that these applicant intervenors chose to pursue claims in Texas relating to CO_2 royalty underpayments arising from the same set of circumstances, while having assigned their rights and claims to the Coalition for adjudication. This course of action poses problems. Regardless, any potential impairment is remedied by the opt-out right preserved in the Settlement Agreement. In January 2002, both chose to exercise this right, so that they are free to pursue their claims however they see fit.

Issues concerning res judicata may have merit as well. It appears that plaintiffs' counsel requested from applicant intervenors' counsel, who represents both Ptasynski and Bridwell in the Texas cases, guidance as to what to do with their claims here. The exhibits plaintiffs attached to their response demonstrate that no guidance was given despite their efforts. As to whether res judicata actually negates any alleged interest that Ptasynski and Bridwell may have, the Court will not make a determination.

Appendix D

One other event reaffirms the appropriateness of denial: the Fifth Circuit's decision in the *Ptasynski* case. Applicant intervenors consider that *Rogers* in conjunction with Ptasynski's success in Texas entitle them to a "no transportation cost" claim here. Unfortunately for applicant intervenors, the Fifth Circuit reversed the lower court's judgment in *Ptasynski and W.L. Gray Co. v. Shell Western E&P Inc., et al.*, No. 99-11049, on the negligent misrepresentation and declaratory judgment claims, thereby making the validity of a "no transportation cost" claim on the basis of the brochure illusory. Perhaps because they have not enjoyed success in their Texas suits to the extent hoped for, Ptasynski and Bridwell want another bite of the apple here, which of course they cannot have. Furthermore, the uncertainty of whether *Rogers* would trigger a stand alone "no transportation cost" claim in this case supports the appropriateness of denying these motions to intervene.

As to other allegations made by Ptasynski and Bridwell, the Court finds these statements conclusory and without merit. There is no evidence that plaintiffs' attorneys engaged in champerty, improper solicitation of business, exertion of undue influence over Coalition managers or members, or collusion and alignment with defendants in reaching settlement or the terms thereof. Lastly, the Coalition did not terminate on July 1, 2001, as Ptasynski and Bridwell contend. Accordingly, for all the reasons articulated herein, it is

ORDERED that the Court affirms the previous denial of applicant intervenor Ptasynski's Motion To Intervene As A Plaintiff Under Rules 23 and 24. It is

Appendix D

FURTHER ORDERED that the Court affirms the previous denial of applicant intervenor Bridwell Oil Company's Motion To Intervene As A Plaintiff Under Rules 23 and 24.

DATED at Denver, Colorado, this 19 day of April, 2002, *nunc pro tunc* March 11, 2002.

BY THE COURT:

s/ Zita L. Weinshienk
ZITA L. WEINSHIENK, Senior Judge
United States District Court

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED AND FILED JANUARY 17, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinshienk

Civil Action No. 00-Z-1854

RUTTER & WILBANKS CORP., et al.,

Plaintiffs,

v.

SHELL OIL COMPANY, et al.,

Defendants.

ORDER

The matter before the Court is applicant intervenors W. L. Gray & Co. and Gerald Bailey's Motion To Intervene As Plaintiffs Under Rules 23 And 24, filed January 10, 2002. Applicants are overriding royalty interest owners in McElmo Dome Unit,[1] and move for intervention on the grounds that

1. Applicants' brief does not discuss in detail the basis for Gerald Bailey's intervention, except to state his unit decimal interest. Mr. Bailey assigned all of his right, title, and interest in his leases to Bridwell Oil Company, subject to an overriding royalty interest reservation. In August 2001, Bridwell Oil Company moved for intervention, which the Court denied on November 14, 2001.

their interests are not adequately protected by the present parties in this case.

In 1999, applicant Gray sued defendants in Texas federal court, and prevailed on the negligent misrepresentation claim only being awarded $352,000 for improper deduction of transportation charges. That Order includes a declaratory judgment that costs incurred in transporting CO_2 from the Colorado situs to the West Texas situs shall not be borne by overriding royalty interest owners, but rather shall be the responsibility of working interest owners. This finding, in conjunction with *Rogers v. Westerman*, 29 P.3d 887 (Colo. 2001),[2] provides the basis upon which applicants move for intervention: the assertion, or lack thereof, of a "no transportation cost" claim, which according to applicants, is worth $170,000,000. In the instant case, a "no transportation cost" claim is not asserted. Apparently, at the time this case, related cases Civil Action Nos. 00-Z-1855, 00-Z-1856, and the seminal case, Civil Action No. 96-Z-2451, *CO_2 Claims Coalition, LLC, v. Shell, et al.*, were filed, the validity of such a claim in Colorado was unclear.[3]

Applicants assert that their interests cannot be adequately represented by plaintiffs' counsel because counsel is engaged in a fraudulent scheme involving interstate commerce, and is in collusion with defendants' counsel, the effect of which

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2. Plaintiffs have argued previously that the validity of a "no transportation cost" claim in Colorado, as alluded to by *Rogers v. Westerman*, is less than clear.

3. This issue was discussed in previous motions to intervene filed in Civil Action Nos. 00-Z-1854, 96-Z-2451, and 00-Z-1856.

releases the valuable "no transportation cost" claim. Allegedly, plaintiffs' counsel are small share working interest owners themselves, and, like defendants, are burdened by overriding royalty interests. Therefore, in releasing the "no transportation cost" claim[4], defendants and plaintiffs' counsel protect themselves from substantial transportation cost liability as a result of their working interests.

This case, related cases Civil Action Nos. 00-Z-1855, 00-Z-1856, and the original case filed on the matter, Civil Action No. 96-Z-2451, have been moving toward settlement, since August 2001.[5] The possibility of a "no transportation cost" claim has been hovering in the background of these cases for some time. It probably has existed since the August 1999, disposition of the Texas case, where the court declared that in calculating future royalties to plaintiffs, defendants cannot deduct transportation costs; and it certainly has existed since the July 2001, *Rogers v. Westerman* opinion. Applicant intervenors now propose intervention a matter of weeks before the final settlement hearing, currently scheduled for February 11, 2002, based on the assertion of, among others, a "no transportation cost" claim. Given the length of time this litigation, as an entire matter, has endured thus far, and the late date at which the applicants move for intervention, the Court will deny the motion. Accordingly, it is

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4. The Class Notice, Section G, describes the "no transportation cost" claim. The Settlement Agreement, Section 7, releases this claim.

5. In December 2001, the Court appointed Fairness Expert Mr. James Lyons to advise the Court and the classes on fairness issues in regard to the conditionally certified classes.

Appendix E

ORDERED that applicant intervenors' Motion To Intervene As Plaintiffs Under Rules 23 And 24 is denied.

DATED at Denver, Colorado, this 15 day of January, 2002.

BY THE COURT:

s/ Zita L. Weinshienk
ZITA L. WEINSHIENK, Senior Judge
United States District Court